



**Kosgey v Spring West Kenya Ltd & 5 others (Environment & Land Case 56 of 2019)
[2023] KEELC 16802 (KLR) (13 April 2023) (Ruling) (with dissent - JM Onyango, J)**

Neutral citation: [2023] KEELC 16802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 56 OF 2019
JM ONYANGO, J
APRIL 13, 2023**

BETWEEN

HASSAN KIPTOO KOSGEY PLAINTIFF

AND

SPRING WEST KENYA LTD 1ST DEFENDANT

EQUITY BANK (KENYA) LTD 2ND DEFENDANT

ELITE VENTURES LTD 3RD DEFENDANT

HIGHLAND VALUERS 4TH DEFENDANT

LYDIA N. WAWERU T/A PURPLE ROYAL INVESTMENT 5TH DEFENDANT

SOY COUNTRY CLUB (1987) LTD 6TH DEFENDANT

RULING

1. By a Notice of Motion dated September 2, 2022 the 4th defendant filed an application seeking orders that :
 - a. The Plaintiff's suit be struck out on the basis that
 - i. It discloses no reasonable cause of action against the 4th defendant
 - ii. It is scandalous, frivolous and vexatious
 - iii. It is otherwise an abuse of the process of the court
 - (b) The costs of this application be borne by the plaintiff in any event.
2. The application is based on the grounds stated on the face of the application and the supporting affidavit of Samuel Kiptala Chemelil, the director of the 4th defendant herein.



3. In the said affidavit Mr Chemelil deposed that the Amended Plaintiff does not disclose any cause of action against the 4th Defendant as the nature of allegations against the 4th defendant if any, cannot be a foundation for any actionable cause. He further deposed that the suit against the 4th defendant ought to be struck out as it discloses no reasonable cause of action against the 4th defendant, it is frivolous, vexatious and an abuse of the process of the court.
4. In response to the application, the Plaintiff filed Grounds of Opposition dated September 25, 2022 in which he raises the following grounds:
 - i. That the 4th defendant/Applicant never considered the occupiers on the land which accommodates several permanent houses, kiosks shops and churches.
 - ii. That the 4th Defendant/applicant failed to disclose the existence, occupation and the developments made on the parcel of land by the Plaintiff/Respondent herein.
 - iii. That the valuation report was never carried out by the 4th defendant/ Applicant as required under the relevant provisions of the Land Act.
 - iv. That there was no economic recession in Kenya when the applicant valued the suit property in order to justify the undervalue of the same.
 - v. That the applicant's valuation enabled the purchasers to buy the suit property at a throwaway price.
 - vi. That the valuation report was inordinately low (sic) and the Applicant herein out of malice never valued the entire land.
 - vii. That no proper and diligent investigation was carried out to ascertain the real owners of Soy Club and the Plaintiff's interest thereon.
 - viii. That the variation in the forced sale price and market price in the valuation report of the entire acreage ought to be commensurate, reasonable and justifiable.
5. The court directed that the application disposed of by way of written submissions and the Plaintiff and 4th Defendant duly filed their submissions. The 1st and 2nd defendants indicated that they did not wish to participate in the application.
6. The only issue for determination is whether the Plaintiff's suit against the 4th defendant ought to be struck out.

Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides as follows: -

- 1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - a. It discloses no reasonable cause of action or defence in law; or
 - b. It is scandalous, frivolous or vexatious; or
 - c. It may prejudice, embarrass or delay the fair trial of the action; or
 - d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.



- (3) So far as applicable this rule shall apply to an originating summons and a petition.
7. The Court of Appeal in *Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu [2009] eKLR* restated these principle thus:

' The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan JA (as he then was) in his judgment in the case of *DT Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1* discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

'The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.'

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts LJ in the case of *Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No 3) (1970) ChpD 506*, where the Lord Justice said:-

'The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.'

We may add that like Madan JA, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.'

8. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No 35 of 2000)* the court expressed itself thus:

' A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial. It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved'.

9. What can be discerned from the above authorities is that even though the court has the discretion to strike out pleadings, such discretion ought to be exercised with the greatest caution so as not to drive a party from the seat of justice.
10. In the instant case, the 4th Defendant contends that plaint does not disclose any cause of action against it as the only allegations against it are that it carried out a valuation in respect of the suit property and prepared a valuation report on behalf of the 2nd defendant. In his submissions, learned counsel for the



plaintiff argues that the 4th defendant breached the provisions of section 97 (2) of the *Land Act* and greatly undervalued the suit property thus causing it to be sold at a throw away price.

11. Although the role played by the 4th Defendant is not articulated in detail in the plaint, it is clear that the Plaintiff blames the 4th defendant for certain breaches of the law which resulted in plaintiff's land being sold by public auction at an undervalue. Without going into the merits of the plaintiff's case, I would be hesitant to strike out the case against the 4th defendant at this early stage.
12. The upshot is that the application is devoid of merit and I dismiss it with costs to the Plaintiff/ Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF APRIL 2023

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J.M ONYANGO

JUDGE

In the presence of:

Miss Kimeli for the 4th Defendant/Applicant

Mr. Collins Kigen for Mr. Songok for the 1st Defendant

Miss Rop for Mr. Langat for the 2nd Defendant

No appearance for the Plaintiff/Respondent

